



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN, TEXAS 78711

**CRAWFORD C. MARTIN
ATTORNEY GENERAL**

November 7, 1968.

**Honorable James E. Barlow
Criminal District Attorney
Bexar County Courthouse
San Antonio, Texas**

Opinion No. M-303

**Re: Authority of a Justice of
the Peace, sitting as a
Magistrate, to require
certification and delivery
of Statement of Facts under
stated circumstances pur-
suant to Articles 16.09
and 17.30, C.C.P.**

Dear Mr. Barlow:

You request the opinion of this office as to the authority of a Justice of the Peace, sitting as a Magistrate, to require a court appointed reporter paid by defense counsel and without cost to the county to give the original transcribed Statement of Facts to the Magistrate for certification pursuant to Article 16.09, Texas Code of Criminal Procedure and for delivery to the clerk of the proper court in accord with Article 17.30, Texas Code of Criminal Procedure. You also ask whether a court reporter's failure upon the advice of defense counsel, to tender the Statement of Facts for certification and delivery constitutes a basis for contempt of court proceedings. In answering your question, we assume that the reporter accepted his appointment as an official court reporter and that defense counsel did not object to such appointment.

Article 16.09 describes the procedure for reducing to writing testimony given before a Justice of the Peace, when sitting as a Magistrate:

"The testimony of each witness shall be reduced to writing by or under the direction of the magistrate, and shall then be read over to the witness, or he may read it over himself. Such corrections shall be made in the same as the witness may direct; and he shall then sign the same by affixing thereto his name or mark. All the testimony thus taken shall be certified to by the magistrate. In lieu of the above provision, a statement of facts authenticated by

State and defense counsel and approved by the presiding magistrate may be used to preserve the testimony of witnesses."

Article 16.09 imposes a mandatory¹ duty on the Magistrate to have a written record of each examining trial. Attorney General's Opinion No. C-562 (1965).

Your opinion request states that "The Magistrates have been using tape recording machines and each side can replay the testimony of any witness any time he desires. (No transcription is sent to the Clerk of the District Courts, and none has ever been demanded)."

The mandatory requirements of Article 16.09 would seem to preclude use of tape recording machines as a substitute for a written record.

Article 17.30 requires the Magistrate to certify the proceedings before him, and deliver them to the proper court for use by the grand jury and the prosecuting office:

"The magistrate, before whom an examination has taken place upon a criminal accusation, shall certify to all the proceedings had before him, as well as where he discharges, holds to bail or commits, and transmit them, sealed up, to the court before which the defendant may be tried, writing his name across the seals of the envelope. The voluntary statement of the defendant, the testimony, bail bonds, and every other proceeding in the case, shall be thus delivered to the clerk of the proper court, without delay." See Kimbrough v. State, 28 Crim.Rep. 367, 13 S.W. 218 (1890).

Neither the mandatory provision of Article 16.09 nor the certification or delivery provisions of Article 17.30 may be complied with if the reporter appointed under the direction of the Magistrate refuses or fails to tender the Statement of Facts to the Magistrate.

However, an officially appointed court reporter who is required by the Magistrate to transcribe and give the court the "original" Statement of Facts is entitled to reasonable compensation for his services to the court aside from any private arrangement he may have with defense counsel. See Attorney General's Opinion M-248 (1968).

¹ Emphasis added throughout.

The examining trial is an official hearing authorized by law. Once a reporter is officially appointed by the Magistrate his Statement of Facts become the work product of the court and may not be withheld for the private advantage of defense counsel.

The very purpose of Article 16.09 is to assure that the testimony of witnesses be preserved and when done by a court appointed reporter, it must be made available to the court so that the Magistrate may fulfill his statutory duty. 16 Tex.Jur. 2d, 314, Criminal Law, Sec. 156, The Examining Trial - Purpose. A failure to do so constitutes criminal contempt of court by unlawfully interfering with its proceedings. 12 Tex. Jur.2d 484, Contempt, Sec. 3.

Defense counsel is an officer of the court and as such may be held guilty of contempt if he fails in his duty with respect to the execution of the court's order. 12 Tex.Jur. 2d, 498, Contempt, Sec. 17.

Article 2386, Vernon's Texas Statutes, states that:

"Justices of the peace shall also have power:

1. To punish any party guilty of a contempt of court by fine not to exceed twenty-five dollars and by imprisonment not exceeding one day."

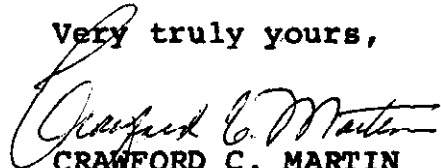
You are therefore advised that a Justice of the Peace, sitting as a Magistrate, has the authority and the duty to require a reporter appointed by the Magistrate to submit the original of his Statement of Facts (for which he receives reasonable compensation) for certification and delivery to the proper court. Anyone interfering with this judicial proceeding may be held in criminal contempt of court.

S U M M A R Y

A Justice of the Peace, sitting as a Magistrate, has the authority and mandatory duty to require examining trial proceedings to be reduced to writing, certified, and delivered to the proper court. When a reporter is officially appointed by the Magistrate, he must be paid a

reasonable compensation for his services in preparing an original Statement of Facts for the Court even though the reporter was first retained and paid by defense counsel. Anyone interfering with this judicial proceeding may be held in criminal contempt of court.

Very truly yours,


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